Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

July 2007

It is OK to use copyrighted nude pictures, as long as they are small enough. In *Perfect 10, Inc. v. Amazon.com, Inc.* (9th Cir.; May 16, 2007) 487 F.3d 701, [2007 DJDAR 6860], the Ninth Circuit held that Google's display of "thumbnail size" photos of nude models on its search engine did not infringe the copyright to those photos held by the plaintiff. The practice qualified as "fair use" under 17 U.S.C. §107.

Statute of limitations defense is for arbitrator to decide. In *Wagner Construction Co. v. Pacific Mechanical Corp.* (Cal. Supreme Ct.; May 21, 2007) 41 Cal.4th 19; 157 P.3d 1029, [58 Cal.Rptr.3d 434, 2007 DJDAR 7142], the trial court denied a petition to compel arbitration on grounds that the claim plaintiff sought to arbitrate was barred by the statute of limitations. Wrong! The Court of Appeal held that where a contract called for arbitration, all the court could do is to compel arbitration. Whether the claim was barred by the statute of limitations was for the arbitrator to decide.

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

Cyber physician is subject to California jurisdiction. The San Mateo County District Attorney charged Christian Hageseth with practicing medicine without a license. Hageseth, a licensed physician in Colorado, had prescribed Prozac to a California resident via the internet. The Court of Appeal held that this activity was sufficient to subject him to the jurisdiction of the California court under *Bus. & Prof. Code* §2052 which prohibits the practice of medicine in this state by a person not licensed here. *Hageseth v. Sup.Ct. (The People)* (Cal. App. First Dist., Div. 2; May 21, 2007) 150 Cal.App.4th 1399, [59 Cal.Rptr.3d 385, 2007 DJDAR 7213].

Time for attorney fee motion after denial of anti-SLAPP motion. The anti-SLAPP statute (*Code Civ. Proc.* §425.16(c)) provides that the court may award attorney fees to a plaintiff who successfully resists a motion under the statute. In *Carpenter v. Jack in the Box Corporation* (Cal. App. Second Dist., Div. 2; May 25, 2007) 151 Cal.App.4th 454, [59 Cal.Rptr.3d 839, 2007 DJDAR 7594], plaintiff, who successfully opposed an anti-SLAPP motion, filed a motion for attorney fees two years after the order denying the motion. The delay was attributable to an unsuccessful intervening appeal by defendants. The trial court granted the motion.

Defendants argued the motion was untimely under *Cal. Rules of Court*, rule 3.1702(b)(1) which requires a motion for statutory attorney fees be filed within the time limits for the filing of a notice of appeal. In rejecting this argument and affirming the award of fees, the Court of Appeal held that the time limit only applied to appeals from the final judgment, not appeals from an interim appealable order.

Request for nondiscriminatory conduct not a condition to recovery under Unruh Act. We previously reported on the *Angelucci* case, an action for discrimination in violation of the *Unruh Civil Rights Act* (*Civ. Code* §52) where a plaintiff complained that the defendant club charged higher admission for men than for women. The trial court held for defendant because plaintiff never requested that the club extend the lower admission fee to him. The Court of Appeal affirmed. Both were wrong. In *Angelucci v. Century Supper Club* (Cal.Supr.Ct.; May 31,

The Litigation Section of the California State Bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, click here or paste this web address into your web-browser: http://www.surveyconsole.com/console/takesurvey?id=195323

Your participation is important and greatly appreciated.

2007) 41 Cal.4th 160, [158 P.3d 718, 59 Cal.Rptr.3d 142, 2007 DJDAR 7789], our Supreme Court ruled that plaintiffs need not demonstrate they requested and were refused the same treatment as women.

Trap for the unwary: petition to vacate arbitration award must be filed within 100 days. Although parties to an arbitration may file a petition to confirm the award at any time within four years after the date of service of a signed copy of the award, a petition to vacate or correct an award must be filed within 100 days of such service. (*Code Civ. Proc.* §1288.) Thus the party dissatisfied with the award cannot wait and raise objections in response to the opponent's petition to confirm the award if the latter petition is filed more than 100 days after service of the award. *Eternity Investments, Inc. v. Brown* (Cal. App. Second Dist., Div. 1; May 30, 2007) (As Mod. June 20, 2007) 151 Cal.App.4th 739, [60 Cal.Rptr.3d 134, 2007 DJDAR 7816]; *also see, Cal. Practice Guide: Alternative Dispute Resolution* (The Rutter Group 2006) ¶ 5:511.)

Humor in the courtroom – too much may lead to reversal. Although humor may have its place in the courtroom, judges may not turn a trial into a comedy show. To read about a judge who failed to draw the proper boundaries in a trial that turned into a version of an Improv show, see *Haluck v. Ricoh Electronics, Inc.* (Cal. App. Fourth Dist., Div. 3; June 4, 2007) 151 Cal.App.4th 994, [60 Cal.Rptr.3d 542, 2007 DJDAR 8154]. Even though respondent pointed out that it also had been the object of the judge's antics, the court noted "this misses the mark. It is like saying a baseball team could not complain if the umpire decided to call balls and strikes with his eyes closed, as long as he kept them closed for both teams."

Pretended ignorance can be expensive. *Michaely v. Michaely* (Cal. App. Second Dist., Div. 5; May 10, 2007) 150 Cal.App.4th 802, [59 Cal.Rptr.3d 56, 2007 DJDAR 6634], — during his deposition, husband, when confronted with his own signature "could not recognize" it, "did not know" how his girlfriend purchased community property, "could not recall" the entities from which he transferred monies, and "had no idea" what assets were owned by the community. The trial court did not buy it and sanctioned husband. The Court of Appeal agreed that sanctions were warranted because of husband's conduct in depriving wife of meaningful discovery and affirmed a $21,000,000 judgment.

Appeal from default judgment does not raise contentions on the merits. Where the court imposed terminating sanctions for discovery abuses, defendant, in his appeal from the default judgment, was not permitted to argue the merits of his defense. The judgment operated as *res judicata* on the issue of plaintiff's right to the relief awarded. Citing Eisenberg *et al., Calif. Practice Guide: Civil Appeals and Writs* (The Rutter Group), the court noted that review of a default judgment is limited to "questions of jurisdiction, sufficiency of the pleadings, and excessive damages, if the damages awarded exceed the sum sought in the complaint. *Steven M. Garber & Associates v. Eskandarian* (Cal. App. Second Dist., Div. 8; April 24, 2007 – ord. pub. May 10, 2007; As Mod. May 22, 2007) 150 Cal.App.4th 813, [59 Cal.Rptr.3d 1, 2007 DJDAR 6638].

Model Code of Civility and Professionalism

As Litigation Section members you can review the Model Code of Civility and Professionalism. We encourage you to do so and post your comments on the Discussion Board at http://members.calbar.ca.gov/discuss